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on

S. 1324

before the

SELECT COMMITTEE ON INTELLIGENCE

of the

United States Senate

June 28, 1983

Mr. Chairman, it is an honor and a pleasure to appear before this Committee in support of S. 1324, a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency. This bill is an important step in strengthening our Nation's intelligence capabilities.

One of the great strengths of our Nation is its tradition of openness in government and accountability to its citizens. It has long been evident, however, that the Freedom of Information Act, an act of government-wide general applicability intended to foster this tradition, does not achieve an appropriate balance when applied to the intelligence community.

A strong intelligence capability is essential for the protection of democratic values and human freedoms in a world sadly marred by continuing war, terrorism, disinformation and totalitarian threats to human liberty. More specifically a strong national intelligence capability is essential, among other reasons, for:

-- maintenance of strategic stability and verification of arms control agreements;

-- defense against threats or use of force in violation of the Charter of the United Nations;

-- protection against terrorism and campaigns of organized violence;

-- protection against efforts to spread disinformation and undermine democratic institutions and human rights; and

-- efforts at maintenance of world order, the role of law in international relations, and conflict management among nations.

These are requirements essential to the survival of our democratic institutions in the complex and difficult world in which we live. In the public debate surrounding intelligence activities it can easily be overlooked that our Nation maintains an intelligence capability because such a capability is essential for peace, strategic stability, and the survival of democratic values. For example, without a reliable and effective intelligence effort meaningful arms control agreement would be impossible. Moreover, in meeting these national security and foreign policy requirements with limited budget resources, it is especially important to have good foreign intelligence to ensure wise allocation of such resources. Although we may wish it not so, effective intelligence capable of meeting these requirements inescapably requires secrecy.

The Freedom of Information Act (FOIA) was not in its genesis a measure aimed at intelligence oversight. Rather, it grew out of reforms in controlling administrative actions generally and was developed to apply across the Executive branch. Indeed, it was significantly toughened by amendments in 1974 to more effectively ensure public access to agency information in general. But in seeking to apply to intelligence agencies depending for their effectiveness on secrecy a FOIA tailored for government-wide maximum access we have created serious problems for such agencies.[1/] These problems, which include the following, are well known to this Committee:

-- a significant chilling effect on individual and inter-service cooperation with our national intelligence effort based on perceptions or misperceptions of the effect of FOIA in breaching secrecy;

-- enhanced risk to unique compartmented security of intelligence agencies as both FOIA requests and searches and personnel associated with such searches increase;

-- diversion of limited human resources of skilled intelligence personnel to FOIA requests and litigation. Unlike other agencies dealing with less sensitive issues, a compromise of intelligence sources or methods can be extraordinarily harmful and the consequent stakes require careful attention to FOIA requests by line professionals with resultant diversion of effort of such professionals. (Indeed under current FOIA doctrine each request may require a line by line review by main component professionals of hundreds or thousands of documents and then for adequate security a double check.)

-- the risks of mistaken release, judicial overruling of intelligence professionals, or compromise of security during the litigation process; risks that increase as the volume of FOIA requests and litigation increases;[2] and

-- the difficulty in coping with a skilled and determined hostile intelligence effort able to use FOIA government-wide to assemble bits and pieces of a broader mosaic not necessarily evident in responding to individual requests (this is usually thought of as a "mosaic problem" but is in addition just as meaningfully a problem of potential differential expertise and focus between requester and responder).

In my judgment these problems are serious and are likely to become more acute as FOIA requests and litigation mount.[3]

Although these problems are generally understood there is another and in a sense even more pervasive problem in seeking to hold agencies engaged in secret operations to accountability through public release of bits and pieces of such operations. Effective public accountability requires that the full context of circumstances surrounding a policy be known. By the nature of effective intelligence, however, the intelligence community is generally not able to make known the full circumstances

surrounding an out of context allegation or bit of information. To encourage public access to what must of necessity be only bits and pieces of information, then, may hold real risks for genuinely informed public debate about such issues. In some cases such partial release may in fact contribute to public misinformation. And to talk of public accountability as a reason for public access to the process of intelligence when it is conceded on all sides that properly classified information will not be made available -- that is, that the core of intelligence methods and operations cannot be publicly available -- is to stretch the normal sense of the term. The reality since the time of the Continental Congress has been that the appropriate mechanisms for oversight of the intelligence community are the special mechanisms of the Executive and Legislative branches of the government that are directly responsible to the democratically elected President and members of Congress. This Select Committee and the careful oversight mechanisms established by law for control of the intelligence community (including the President and the National Security Council, the President's Intelligence Oversight Board, the Attorney General, the structure of Executive orders and laws governing intelligence operations, internal agency oversight and inspectors general, and the careful process of Congressional scrutiny through appropriations, reporting requirements and authorization measures) are the appropriate mechanisms for intelligence oversight.[4/] This is not to suggest that intelligence methods and objectives will alone escape public debate in a democratic society but rather to remind us that fully informed oversight of such activities will only be

provided by the appropriate Presidential and Congressional oversight mechanisms that are in fact fully informed.

Although the American Bar Association has not adopted an Association position on these issues, the Standing Committee on Law and National Security has for some time sponsored a Working Group on National Security and the Freedom of Information Act chaired by Robert Saloschin under the general direction of John Shenefield as Chairman of the Committee's Task Force on The Justice System and National Security. The work of this group has fully reflected awareness of the special problems presented in applicability to the intelligence community of a FOIA intended for government-wide application and the need for appropriate relief for that community.5/

Mr. Chairman, with these general remarks as background, I strongly support prompt passage of S. 1324 now being considered by this Committee. The principal mechanism of this bill, to provide relief to the Central Intelligence Agency from the burdens of searching and reviewing operational files, as opposed to product files, should alleviate some of the more acute problems associated with applicability of FOIA to the Agency.6/ Operational files, in dealing with sources and methods, are particularly sensitive and any perception or misperception as to their public availability has an acute chilling effect on sources. At the same time since these files have not in practice been subject to public release under FOIA their exclusion from the burdens of searching and reviewing will not diminish any public information now available under FOIA. And the release of Agency resources from the needless search and review of operational files should enable more

timely response to requests concerning product files.[7/]

Mr. Chairman, and members of the Committee, in S. 1324 the Committee would seem to be in the enviable position of having legislation that would significantly meet some of the problems associated with applicability of the necessarily more generalized government-wide FOIA to the Central Intelligence Agency without curtailing the real world information flow of the Act. This bill is likely to be -- and should be -- supported by persons of all political persuasions.

Finally, Mr. Chairman, let me state that although I support S. 1324 I believe that ultimately the only satisfactory solution to this problem is a more general exclusion for the intelligence community from the requirements of FOIA. No other Nation in the world subjects its intelligence community to the perception or misperception of public disclosure on demand. And in my judgment the public benefit of FOIA applicability to the intelligence community -- and there will always be some -- is outweighed by the risks to democratic institutions through weakened intelligence and the risk of public misinformation inherent in necessarily incomplete disclosures about intelligence activities.

FOOTNOTES

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1/ If by some happy accident a Freedom of Information Act tailored for government-wide applicability had struck a perfect balance between access and the needs of secrecy in the intelligence community it would suggest that the balance was overly restrictive for all other parts of government not sharing the extreme sensitivity of that community. The reality, however, seems to be the opposite. That is, FOIA was designed -- and then specifically strengthened -- for maximum public access in dealing with agencies less sensitive than the intelligence community. In that circumstance, not surprisingly, FOIA has not struck an appropriate balance for applicability to the intelligence community. There simply is a difference between the Department of Agriculture and the Central Intelligence Agency. One obvious difference is the degree of sensitivity in operations for gathering information. A less obvious but quite important additional difference is the potential to respond to out of context or erroneous allegations by providing full information and public rebuttal. This latter potential is frequently lacking in intelligence matters.

2/ De novo judicial review of government national security classifications has become a widespread practice under FOIA. The September 1982 Edition of the Department of Justice Case List, at page 225, shows 166 decisions in cases involving classified national security information, most of them since 1974 when de novo review was required. This total only includes cases with opinions, not those disposed of just with orders, those still pending, or those terminated prior to decision. In about a dozen cases, federal courts have rejected national security classifications, the most recent including Nuclear Control Institute v. NRC, Civil No. 82-1476, D.D.C., May 20, 1983, and McGehee v. CIA, No. 82-1096, D.C. Cir., Jan. 4, 1983. While these rulings against classification usually did not result in the compelled release of

a classified document, due to a later change of position by either party, a later decision on appeal or on remand, or withholding sustained under a different exemption, it is clear that the courts now undertake de novo review of classified national security documents vigorously and that such review is frequently sought.

3/ For a fuller discussion of these problems see, e.g., "Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities," Hearing before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Congress, 1st Session (April 5, 1979); "Freedom of Information Act," Hearings before the Subcommittee on the Judiciary, United States Senate, 97th Congress, 1st Session, on S. 587, S. 1235, S. 1247, S. 1730 and S. 1751 (July 15, 22, 31, Sept. 24, Oct. 15, Nov. 12 and Dec. 9, 1981); "To Restore the Balance: Freedom of Information and National Security," No. 213 Heritage Foundation Backgrounder (Sept. 23, 1982); Law, Intelligence and National Security Workshop (sponsored by the American Bar Association Standing Committee on Law and National Security, Dec. 11-12, 1979); Cole, The Freedom of Information Act and the Central Intelligence Agency's Paper Chase: A Need for Congressional Action to Maintain Essential Secrecy for Intelligence Files While Preserving the Public's Right to Know, 58 Notre Dame L. Rev. 350 (1982); Report with Recommendations of the Section of Administrative Law of the American Bar Association to the House of Delegates (Dec. 1982) (among other issues, this report focuses on the important need for relief in the standard for judicial review of intelligence agency classification decisions); Report with Recommendations on the Freedom of Information Act of the American Bar Association Criminal Justice Section (June 1983); "Recommending FOIA Amendments as Desirable for the National Security," Report to the American Bar Association Standing Committee on Law and National Security of the Committee Task Force on Freedom of Information Changes (Dec. 16, 1982). See particularly the testimony of William J. Casey, Admiral B. R. Inman and Frank C. Carlucci respectively on Sept. 24, 1981 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, Feb. 20, 1980 before the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee, and July 21, 1981 before the Senate Select Committee on Intelligence.

In addition to these policy problems in applicability of FOIA to the intelligence community there is also a lurking constitutional issue concerning potential interference with executive privilege and in specific instances possible interference with areas of Presidential authority. It should be recalled that President Ford vetoed the 1974 amendments to FOIA based in large part on constitutional concerns relating to separation of powers in the national security area. See, for example, with respect to the underlying constitutional issue John Jay writing in The Federalist in 1788:

"There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a larger popular assembly. The convention have [sic] done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest." [John Jay, in The Federalist, ed. Jacob E. Cooke (Middleton, Conn. Wesleyan Univ. Press 1961), at 434-35.]

And the Supreme Court writing in United States v. Curtiss-Wright Export Corp.: "[The president] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which was recognized by the House itself and has never since been doubted. [299 U.S. 304, 320 (1936)]

And more recently in its opinion in United States v. Nixon the Supreme Court said it would accord to the President "the utmost deference" in intelligence matters. United States v. Nixon, 418 U.S. 683, 706, 707, 710, 711 and 712 n.19 (1974).

4/Much of this strengthening in mechanisms for oversight of the intelligence community, including establishment of the Senate and House Select Committees on Intelligence and the President's Intelligence Oversight Board, has occurred after enactment of FOIA.

5/There are also other entities within the ABA which are concerned with these problems and have been studying the matter. In fact, resolutions dealing with proposed amendments to the Freedom of Information Act will be the subject of debate in the ABA House of Delegates in August, after which I am sure the Association would be glad to report back to you any formal position it may take on these matters.

6/This bill if enacted would constitute a statute within the meaning of FOIA exemption three. Indeed, if it did not, there would be no purpose in enacting it.

7/ This bill would also properly restrict the ability of non-resident aliens to make "first-person" requests for information concerning themselves under the Freedom of Information Act. FOIA was designed principally to promote an informed citizenry. Moreover, it has always been a particular anomaly under FOIA that United States citizens as taxpayers must subsidize such foreign requests.